

STATE OF MICHIGAN
COURT OF APPEALS

VIKING CORPORATION,

Plaintiff-Appellant,

v

DANIEL VAN DYKE and VAN DYKE
GARDNER LINN & BURKHART LLP,

Defendants-Appellees.

UNPUBLISHED

April 5, 2011

No. 290063

Kent Circuit Court

LC No. 07-011286-NM

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Plaintiff, Viking Corporation, appeals as of right an order granting defendants Daniel Van Dyke and Van Dyke Gardner Linn & Burkhardt LLP (plaintiff's former attorney and his firm) summary disposition of plaintiff's legal malpractice claim. We affirm.

I.

In 2003, Central Sprinkler Company ("Central") was the sole and exclusive owner of the United States and foreign patents, which claim priority to an application with the United States Patent and Trademark Office numbered 08/813,780 ("the '780 application") for low pressure, early suppression fast response sprinklers, including United States Patent No. 5,829,532 ("the '532 patent"), United States Patent No. 6,336,509 ("the '509 patent"), United States Patent No. 6,502,643 ("the '643 patent") and United States Patent No. 6,868,917 ("the '917 patent"). At that time, Central initiated a patent infringement suit involving The Reliable Automatic Sprinkler Co., Inc. ("Reliable"), Victaulic Company of America ("Victaulic"), and plaintiff ("Joint Defense Group" collectively). Plaintiff's ESFR Pendent K25.2 Sprinkler claimed priority to the '780 application.

According to an agreement ultimately reached by the parties in 2005, the Joint Defense Group participated in settlement negotiations "to obtain a non-exclusive license under all currently issued patents that claim priority to the '780 application" and "to obtain a non-exclusive license under any patent claiming priority to the '780 application that may issue in the future." Plaintiff and Reliable agreed to pay \$1,000,000 to Central for past infringement. In exchange for royalties, Central granted a license to plaintiff, *inter alia*, "to make, have made, use, sell, offer to sell, import, and export products that f[e]ll within the scope of the claims of the *Subject Patents*." (Emphasis added.) The agreement defines "Subject Patents" as "any and all

patents that claim priority to the '780 application, whether existing as of the date of the execution of this Agreement by all parties, or that may subsequently issue to Central.” Michael Bosma (plaintiff’s president), Thomas Deegan (plaintiff’s vice president of marketing development), and Thomas Groos (chief executive officer of plaintiff’s parent corporation) all read and approved this agreement before Bosma signed it.

In 2007, Central’s parent corporation, Tyco International Ltd (“Tyco”) initiated a patent infringement suit against plaintiff based on two different patents—the 6,059,044 patent (“the ‘044 patent”) and the 7,165,624 patent (“the ‘624 patent”). Because plaintiff had a negative prospect for success in litigation, it reached a settlement with Tyco, releasing plaintiff from any claims arising out of “patents that claim or may claim in the future priority to or from the ‘789 application and/or the ‘044 patent and/or the ‘624 patent, whether in existence as of the date of the execution of this Agreement, or that may subsequently issue to Tyco.” Tyco granted a license to plaintiff “to make, have made, use, sell, offer to sell, import, and export products that f[e]ll within the scope of the claims of the Subject Patents.”

Plaintiff thereafter filed a complaint alleging malpractice by defendants. Plaintiff maintained that, during the 2005 settlement negotiations, it understood that Central and Tyco were the same entity and its goal had been for all the “children in the Tyco family” to be bound by the 2005 agreement and for plaintiff to be “covered” with respect to large K factor sprinklers in the storage marketplace. Consequently, plaintiff maintained that the costs of the 2007 settlement agreement were duplicative. Plaintiff alleged that defendants committed malpractice by: 1) counseling plaintiff to enter into the 2005 agreement, 2) failing to include the ‘044 patent and the ‘624 patent in the 2005 agreement, or advise that they were excluded, 3) failing to include Tyco in the 2005 agreement, or advise that Tyco was excluded.

Defendants filed a motion for summary disposition. They argued that plaintiff’s claims of malpractice were barred by the attorney judgment rule. They also argued that plaintiff could not establish proximate cause. Defendants could not have anticipated the separate 2007 suit by Tyco on unrelated patents—the ‘044 and ‘624 patents “w[ere] not on anybody’s radar screen”—and there is no evidence that the parties would have agreed to a settlement of those patents. Next, defendants argued that plaintiff was estopped from claiming it did not understand the 2005 agreement because plaintiff is presumed to have read and understood the agreement by signing it. Van Dyke never advised plaintiff that Tyco was bound by the agreement and, although initial drafts of the agreement included Tyco, plaintiff read subsequent drafts by Central that excluded Tyco. Finally, defendants argued that plaintiff’s claims regarding the 2005 agreement were inadmissible under the parol evidence rule.

In granting defendants’ motion for summary disposition, the trial court relied on defendants’ estoppel argument and noted that plaintiff extensively participated in the drafting of the agreement.

II.

Plaintiff’s first argument on appeal is that the trial court erred in applying estoppel to their claim that defendants failed to include Tyco in the 2005 agreement or advise plaintiff that the agreement excluded Tyco. We disagree.

This Court reviews a trial court's ruling on a motion for summary disposition de novo.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed [v Breton]*, 475 Mich 531, 537; 718 NW2d 770 (2006)]. The motion is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The elements of a malpractice action are: “(1) the existence of the client-attorney relationship, (2) the acts allegedly constituting the negligence, (3) that the negligence was the proximate cause of the injury, and (4) the existence and the extent of the injury alleged.” *Espinoza v Thomas*, 189 Mich App 110, 115; 472 NW2d 16 (1991). “[T]o prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury.” *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

““This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.”” *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999), quoting *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972); see also *Watts v Polaczyk*, 242 Mich App 600; 619 NW2d 714 (2000) (an attorney and law firm sought to enforce an arbitration agreement as a defense to the client's malpractice claim and the client's claim that he did not understand that the arbitration agreement was part of the retainer he signed was unsuccessful because a signatory is presumed to know the nature of the instrument), and *De Valerio v Vic Tanny Int'l*, 140 Mich App 176; 363 NW2d 447 (1984) (in defending a negligence and breach of warranty case, a gym sought to enforce the plaintiff's contractual waiver of all claims resulting from the plaintiff's use of the gym's facilities and equipment, and the plaintiff's defense that she did not read the contract before signing it was unpersuasive).

The general presumption that a signatory knows the nature of a document is not applicable when the neglect to read the document is due to fraud, coercion or mistake. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144-145; 706 NW2d 471 (2005). However, “there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Webb v First of Michigan Corp*, 195 Mich App 470,474; 491 NW2d 851 (1992).

Defendants claim, and we agree, that because plaintiff signed the 2005 agreement, it should be presumed to know and understand the nature of the document—especially the fact that Tyco was not a party to the agreement and Tyco would not be bound by it. In addition, plaintiff offers no evidence that defendants advised it otherwise. Plaintiff's executives claim that a release from Tyco was one of the goals of the 2005 settlement negotiations and that they believed Tyco and Central were the same entity. However, Van Dyke testified, and Deegan confirmed, that Van Dyke never told plaintiff that Tyco would be bound by the 2005 agreement. On the contrary, Van Dyke explained that Central flatly rejected a draft including Central and its

parents, but plaintiff's executives thereafter continued reviewing and negotiating drafts that excluded Central's parents.

Plaintiff argues that the presumption that a party has read and understood an agreement should not apply in this situation because it is not attempting to enforce the agreement against a party to the agreement. Although the presumption has generally been enforced against parties to agreements, plaintiff has cited no authority for the proposition that the presumption should not also apply to a party who reads and signs an agreement, but subsequently argues that counsel was negligent for failing to explain that the plain language of the agreement applies. *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (noting that "[t]he failure to cite sufficient authority results in the abandonment of an issue on appeal"). Moreover, ignorance of the law is no excuse. The reason for this maxim "is not because everyone knows the law, but because ignorance of it is a ready excuse easily raised and difficult to refute." 17A Am Jur 2d, Contracts, § 209.

Plaintiff also argues that a person seeking estoppel should be barred from receiving equitable relief if there is any indication of overreaching or unfairness on the person's part. *Royce v Duthler*, 209 Mich App 682, 688-689; 531 NW2d 817 (1995). Plaintiff notes that, pursuant to plaintiff's new attorney's request during the 2007 proceedings, Van Dyke prepared several draft declarations stating that Central equaled Tyco for purposes of the 2005 agreement. Consequently, plaintiff argues that it would be unfair to require it to understand that the plain language of the agreement excluded Tyco if Van Dyke, an attorney, did not understand that fact. We decline to address this issue because it was not preserved by the trial court and the record is not fully developed with respect to these unsigned declarations, labeled "ATTORNEY WORK PRODUCT." Van Dyke testified that he never agreed to sign the declarations under oath and the record suggests that the declarations were never filed in the 2007 proceedings.

Plaintiff next argues that the presumption should not apply because a plaintiff in a legal malpractice case, having settled with a defendant in an underlying action, is not precluded as a matter of law from maintaining a subsequent legal malpractice cause of action against the attorney who represented the plaintiff in the underlying action. However, in *Espinoza v Thomas*, 189 Mich App 110, 123-124; 472 NW2d 16 (1991), quoting *Becker v Julien, Blitz & Schlesinger, PC*, 95 Misc 2d 64, 66; 406 NYS2d 412 (1977), this Court stated:

"Where the termination [of a case] is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish, but a cause of action can be made out if it is shown that assent by the client to the *settlement was compelled* because prior misfeasance or nonfeasance by the attorneys left no other recourse. . . ." [Emphasis added.]

Even if the failure to include Tyco in the 2005 agreement or advise plaintiff that the agreement excluded Tyco constitutes negligence, plaintiff cannot show that this negligence proximately caused any injury. Plaintiff was not coerced to settle. It participated in the negotiations, saw that drafts of settlement agreements that included Central's parent company were rejected, and is presumed to have read and understood that the agreement did not bar future claims by Tyco. With this understanding, as plaintiff admits, it could have chosen not to settle, proceeded to trial, and discontinued the use of products that claimed priority to the '780 application. Therefore,

plaintiff has not established that it was left without recourse or that it would have acted any differently if defendants had advised plaintiff that the agreement did not bar future claims by Tyco. Moreover, plaintiff has failed to demonstrate that defendants' failure to include Tyco in the agreement or the failure to advise plaintiff that Tyco was excluded from the agreement (an agreement that involved only patents claiming priority to the '780 application) was the cause in fact of the costs associated with the 2007 agreement, which involved different patents claiming priority to the '789 application. Because plaintiff cannot demonstrate that defendants' failure to include Tyco in the agreement or the failure to advise plaintiff that Tyco was excluded proximately caused the alleged injury, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

Plaintiff having prevailed on appeal is entitled to costs. MCR 7.219(A).

/s/ Cynthia Diane Stephens

/s/ Jane E. Markey

/s/ Kurtis T. Wilder